STATE OF MICHIGAN

COURT OF APPEALS

WESLEY & VELTING, L.L.C., Plaintiff-Appellant,	UNPUBLISHED October 2, 2008
v	No. 278264 Kent Circuit Court
VILLAGE OF CALEDONIA, Defendant-Appellee.	LC No. 04-009192-CZ

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

In this case involving a challenge to a zoning ordinance, plaintiff appeals as of right the trial court's order granting summary disposition to defendant. Because the amended zoning ordinance does not violate MCL 125.3405 and because plaintiff's challenge to the original zoning ordinance is moot, we affirm.

Plaintiff's property was zoned agricultural. Seeking to construct a 136-unit single-family residential development on the property, plaintiff sought to have the property rezoned, first to an R-2 district and then to a planned unit development (PUD) district. After defendant's council and the zoning board of appeals denied plaintiff's rezoning request, plaintiff filed a two-count complaint in September 2004. The first count alleged that defendant's zoning ordinance "as it applies" to plaintiff's property failed to advance any reasonable governmental interest.[1]

In November 2005, defendant amended its zoning ordinance by rezoning plaintiff's property to a PUD district. This rezoning allowed plaintiff to develop its property as a PUD subject to terms and conditions contained in the zoning ordinance.

Defendant thereafter moved for summary disposition under MCR 2.116(C)(8) and (10) on count 1 of plaintiff's complaint. Defendant argued that because a trial court is to apply the zoning ordinance in effect at the time of decision, plaintiff's challenge to the zoning ordinance

[1] In count II of the complaint, plaintiff claimed the zoning ordinance denied it a legitimate use of the property, neo-traditional development, "in violation of MCLA 127.297a." The trial court's grant of summary disposition on this count is not challenged on appeal.

was rendered moot when defendant amended the ordinance. Defendant claimed that it had not rezoned plaintiff's property to a PUD district in bad faith and with unjustified delay, a phrase that has been equated with manufacturing a defense. According to defendant, case law provided that a local unit of government only manufactures a defense when, after the plaintiff has filed suit, it amends the zoning ordinance to prohibit a land use that had been permitted by right. Applying this rule to the present case, defendant claimed that because plaintiff's property had never been zoned to permit a high density residential development, it did not manufacture a defense when it amended the zoning ordinance.

In response, plaintiff claimed that the amended zoning ordinance did not apply for two reasons. First, the amended ordinance violated MCL 125.3405 because defendant, by rezoning plaintiff's property to a HUD district, imposed terms and conditions on the property to which plaintiff had not agreed. Second, defendant amended the zoning ordinance to manufacture a defense. Plaintiff pointed to the following facts to support this conclusion: (1) defendant did not amend the ordinance until a year and a half after plaintiff filed suit; (2) defendant's counsel, when he introduced the amended ordinance to defendant's council, admitted the amendment was to "avoid the technicality that the litigation was based on"; (3) defendant's council tabled plaintiff's second request to rezone a portion of the property to R-2 until after it amended the zoning ordinance; and (4) only plaintiff's property was affected by the amendment.

In granting defendant's motion for summary disposition, the trial court reasoned:

> In all likelihood, defendant's current zoning ordinance, which was not in effect when this case was filed, governs plaintiff's challenge to the denials by defendant's Council and Zoning Board of Appeals of its respective requests for rezoning and for a use variance. Subject to only two exceptions, neither of which is available to plaintiff in this case, when a zoning ordinance is changed while litigation over its application is pending, the later version applies. *Landon Holdings, Inc v Gratton* [sic] *Twp*, 257 Mich App 154, 161[; 667 NW2d 93] (2003).
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> A court cannot apply an amendment to a zoning ordinance which "would destroy a vested property interest acquired before its enactment. . . ," *id.*, nor an amendment which was "enacted in bad faith and with unjustified delay." *Id.* A mid-litigation amendment is considered to have been undertaken in bad faith when it "was enacted for the purpose of manufacturing a defense . . . ." *Lockwood v Southfield*, 93 Mich App 206, 211[; 286 NW2d 87] (1979). That occurs only when the decision which is the subject of litigation was plainly wrong, and the amendment remakes the ordinance such that an incorrect decision becomes acceptable.
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> Plaintiff does not claim the first exception, and its reliance on the second exception is unavailing. Given the nature of plaintiff's challenge to them, defendant's decisions were not improper when made. The "old" ordinance was neither unreasonable nor exclusionary, which are plaintiff's objections to it. Hence, applying the new ordinance does not deprive plaintiff of a favorable decision to which it would be entitled here if this Court were to apply the previous ordinance. In other words, plaintiff would lose were that ordinance used, which

> means that the new ordinance does not manufacture an otherwise-unavailable defense.
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> Density restrictions, which are the essence of the former ordinance, advance legitimate goals of avoiding overcrowding and not overburdening available infrastructure, such as roads. *Conlin v Scio Twp*, 262 Mich App 379, 394[; 686 NW2d 16] (2004). Therefore, that ordinance was reasonable on its face and, as such, was enforceable. . . .
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> For the same reason[], the current ordinance is reasonable . . . . Nor does MCL 125.3405 invalidate that ordinance. That statute does not require landowners to concur in all zoning ordinance amendments. Read in context, that statute precludes amending a zoning ordinance without an affected landowner's concurrence *only if* the ordinance was the product of an agreement between the landowner and the government. Municipalities need not otherwise get a landowner's concurrence. Hence, because the ordinance in effect when this case was filed was not the product of an agreement between it and defendant, plaintiff need not have concurred in the new ordinance.

On appeal, plaintiff makes two arguments. First, plaintiff claims that, because it only challenged the original zoning ordinance "as applied" to its property, the trial court erred in dismissing count I on the basis that the ordinance was valid on its face. Second, plaintiff claims the trial court erred in concluding that MCL 125.3405 did not invalidate the amended ordinance.

We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Johnson v Botsford Gen Hosp*, 278 Mich App 146, 151; 748 NW2d 907 (2008). Although the trial court did not state under which provision it was granting defendant's motion, both the parties and the trial court went outside the pleadings in arguing and deciding the issue. Thus, we view the motion as being granted under MCR 2.116(C)(10). See *Driver v Hanley*, 226 Mich App 558, 562; 575 NW2d 31 (1997). Summary disposition is proper under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

We also review issues involving statutory interpretation de novo. *Big L Corp v Courtland Constr Co*, 278 Mich App 438, 441; 750 NW2d 628 (2008). The goal of judicial interpretation of a statute is to ascertain and give effect to the intent of the Legislature. *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006). If the language of the statute is unambiguous, we must enforce the statute as written. *Id.*

We first address plaintiff's claim that because defendant rezoned its property to a PUD district, thus subjecting the property to terms and conditions contained within the zoning ordinance, the amended ordinance is invalid under MCL 125.3405. We disagree.

MCL 125.3405 provides:

> (1) An owner of land may voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map.
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> (2) In approving the conditions under subsection (1), the local unit of government may establish a time period during which the conditions apply to the land. Except for an extension under subsection (4), if the conditions are not satisfied within the time specified under this subsection, the land shall revert to its former zoning classification.
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> (3) The local government shall not add to or alter the conditions approved under subsection (1) during the time period specified under subsection (2) of this section.
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> (4) The time period specified under subsection (2) may be extended upon the application of the landowner and approval of the local unit of government.
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> (5) A local unit of government shall not require a landowner to offer conditions as a requirement for rezoning. The lack of an offer under subsection (1) shall not otherwise affect a landowner's rights under this act, the ordinances of the local unit of government, or any other laws of this state.

MCL 125.3405, by its plain language, provides a mechanism for contractual zoning, whereby an agreement may be formed between an owner of land and the local unit of government in which the landowner receives a desired rezoning in exchange for certain use and development conditions on the property. Once this agreement is formed, the local unit of government is prohibited from altering the conditions during the time in which the agreement is valid. In this case, as noted by the trial court, the original zoning ordinance was not the result of an agreement between plaintiff and defendant. Therefore, MCL 125.3405 did not preclude defendant, after rezoning plaintiff's property to a HUD district, from subjecting plaintiff's property to terms and conditions contained the ordinance. The trial court correctly held that MCL 125.3405 did not invalidate the amended zoning ordinance.

We now turn to plaintiff's claim that because it only asserted an "as applied" challenge to the zoning ordinance, the trial court erred in dismissing count I upon finding that the ordinance was reasonable on its face. We conclude the issue is moot.

An issue is moot when a subsequent event renders it impossible for this Court to fashion a remedy. *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 673 NW2d 756 (2003). We rejected plaintiff's only appellate challenge to the validity of the amended ordinance. Therefore, the amended zoning ordinance applies. See *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 161; 667 NW2d 93 (2003) ("In determining which version of a zoning ordinance a court should apply, the general rule is that the law to be applied is that which was in effect at the time

of decision") (quotations and citations omitted).[2] Because the amended zoning ordinance applies, this issue is moot because we are unable to fashion a remedy to plaintiff's challenge to the original ordinance. *Dudzinski, supra*. In addition, as plaintiff conceded at oral arguments, an "as applied" challenge to the amended ordinance is not yet ripe because plaintiff has not exhausted its administrative remedies. *Conlin, supra* at 382-382.

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto

[2] As noted *supra*, plaintiff also challenged the validity of the amended zoning ordinance below on the ground that it was a manufactured defense to its "as applied" challenge to the original zoning ordinance. The trial court addressed and resolved the issue against plaintiff, and that ruling by the trial court is not challenged on appeal.